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IN THE
COURT OF APPEALS OF INDIANA

ERIC GUESS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0611-CR-1010
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Charles Wiles, Senior Judge
Cause No. 49G04-0601-FC-238

August 3, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Eric Guess appeals his convictions for Battery[1] as a class C felony; Domestic Battery[2] as a class A misdemeanor; and Aggravated Battery[3] as class B felony. He raises the following three issues for our review:

1. Did the trial court err in refusing to give his tendered self-defense instructions?

2. Is there sufficient evidence to support his aggravated battery conviction?

3. Did the trial court err in sentencing him?

We affirm.

On December 31, 2005, Rachelle and Eric Guess rented a hotel suite at the Keystone at the Crossing Sheridan House to celebrate the New Year as well as their reconciliation following a four-month separation. The following night, the couple brought their one-year-old daughter and Rachelle's thirteen-year-old daughter to the hotel to spend the night with them.

While Rachelle was sitting on the bed in a t-shirt and underwear holding her one-year-old daughter, Guess began yelling about her teenaged daughter's cell phone use. Rachelle's older daughter had been the source of problems for the Guesses in the past, and Rachelle told Guess that she was not going to leave her children for him, the reconciliation was not going

[1] Ind. Code Ann. § 35-42-2-1 (West, PREMISE through 2007 Public Laws approved and effective through April 8, 2007).

[2] Ind. Code Ann. § 35-42-2-1.3 (West, PREMISE through 2007 Public Laws approved and effective through April 8, 2007).

[3] Ind. Code Ann. § 35-42-2-1.5 (West, PREMISE through 2007 Public Laws approved and effective through April 8, 2007).

to work, and she was going to divorce him.

Guess responded by hitting Rachelle in the face with his fist at least ten times. When Guess slipped while throwing a punch, Rachelle slid across the bed with her daughter and ran out the door. Both Rachelle and her daughter were covered in blood. A hotel worker saw them in the hallway and quickly put them in an elevator and took them to the hotel lobby.

When the police arrived at the scene, they apprehended Guess in the parking lot. Guess told the officers that he had "smacked the shit out of [Rachelle] and held her down against her will." *Transcript* at 48. Rachelle was rushed to the hospital where she was diagnosed as suffering from a medial orbital fracture, which is a fractured eye socket. Rachelle's eye was swollen shut and she was unable to see out of it until she had surgery to repair the socket. The surgery included the removal of soft tissue and insertion of an implant to guide the scar tissue in its regeneration of the area.

Guess was charged with Count I, battery as a class C felony; Count II, domestic battery as a class A misdemeanor; and Count IV, aggravated battery as a class B felony.[4] At trial, Rachelle testified that she has continued to have problems with her eye after surgery. For example, normal drainage that is supposed to go behind her nasal cavity comes out her eye. She also has intermittent tearing and difficulty seeing to drive on both sunny and rainy days, and may require additional surgery to correct the tearing.

At trial, Guess testified that he hit Rachelle because she hit him. He admitted that he was not injured, and that Rachelle has continuing eye problems. The jury convicted him of

[4] Guess was also charged with Count III, invasion of privacy as a class A misdemeanor. The trial court granted the State's motion to dismiss this count before trial.

all three counts.

Following a sentencing hearing, the trial court found Guess's remorse and the fact that he has a one-year-old daughter to be mitigating factors. The court found Guess's criminal history, including his history of violence, to be an aggravating factor. Thereafter, the trial court sentenced Guess as follows: eight years for the battery conviction, 365 days for the domestic battery conviction, and twenty years with four years suspended and sixteen years executed for the aggravated battery conviction. The court merged the sentences because the offenses arose out of the same circumstances for a total executed sentence of sixteen years. Guess appeals his conviction and sentence.

1.

Guess first argues that the trial court erred in refusing to give his tendered self-defense instructions. In determining whether a trial court properly refused tendered instructions, we consider whether the proposed instructions correctly state the law, whether the evidence in the record supports the instructions, and whether the substance of the tendered instructions is covered by other instructions. *White v. State*, 726 N.E.2d 831 (Ind. Ct. App. 2000), *trans. denied*.

Indiana Code Ann. § 35-41-3-2 (West, PREMISE through 2007 Public Laws approved and effective through April 8, 2007) provides that a person is justified in using reasonable force against another to protect himself from what he reasonably believes to be the imminent use of unlawful force. A defendant's belief that he is being threatened with impending danger must be reasonable and in good faith. *White v. State*, 726 N.E.2d 831.

Thus, the key to determining whether Guess was entitled to an instruction on self-defense is whether there was evidence in the record that he reasonably believed he was facing the imminent use of unlawful force and that the action taken, here the beating of Rachelle, was necessary to defend against that force.

Our review of the transcript in this case reveals no evidence that Guess reasonably believed he was facing the imminent use of unlawful force. Guess does not allege that Rachelle was armed, and we find no such evidence. Rather, the evidence reveals that Rachelle was simply sitting on the bed with her one-year-old daughter when Guess punched her in the face at least ten times. There is no evidence that the beating of Rachelle was necessary to defend against unlawful force. Under these circumstances, the trial court did not err in refusing to give Guess's tendered self-defense instructions.[5]

2.

Guess next argues that there is insufficient evidence to support his conviction of aggravated battery. A person who knowingly or intentionally inflicts injury that causes protracted loss or impairment of a bodily member commits aggravated battery. I. C. § 35-42-2-1.5. "Protracted" means to draw out or lengthen in time or to prolong. *Neville v. State,* 802 N.E.2d 516 (Ind. Ct. App. 2004) (consulting a dictionary for a definition of protracted where there is not statutory definition for the word), *trans. denied*. "Impairment" means the fact or state of being damaged, weakened, or diminished. *Fleming v. State,* 833 N.E.2d 84 (Ind. Ct. App. 2005).

[5] We note that the trial court gave other self-defense instructions, which were not warranted under the facts of this case.

Guess contends there is insufficient evidence that he caused a protracted impairment to Rachelle's eye. Our standard of review for a sufficiency of the evidence claim is well settled. In reviewing the sufficiency of the evidence, we will not reweigh the evidence or assess the credibility of witnesses. *White v. State*, 846 N.E.2d 1026 (Ind. Ct. App. 2006), *trans. denied*. We will consider only the evidence most favorable to the judgment, together with all reasonable and logical inferences to be drawn therefrom. *Id.* The conviction will be affirmed if there is substantial evidence of probative value to support the conviction of the trier of fact. *Id.*

Here, our review of the transcript reveals that Guess fractured Rachelle's eye socket. Her eye was swollen and she was unable to see out of it until she had surgery to repair the socket. Further, at trial, almost ten months after Rachelle's eye surgery, Rachelle continued to have problems with her eye. For example, nasal drainage comes out of her eye, and she has difficulty seeing to drive on both sunny and rainy days. She also has intermittent tearing, which may require additional surgery to correct. This evidence supports the jury's determination that Guess caused a protracted impairment to Rachelle's eye, and we find sufficient evidence to support Guess's conviction of aggravated battery.

3.

Guess also argues that the trial court erred in sentencing him. Specifically, he argues that the trial court failed to consider mitigating circumstances and improperly balanced the aggravating and mitigating circumstances. He also contends that his sentence is inappropriate in light of the nature of the offense and the character of the offender. We address each of his contentions in turn.

As a preliminary matter, we note that our Supreme Court recently decided *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), which provides that under the new sentencing statutes, a defendant may challenge a felony sentence on two bases – one procedural and the other concerning the appropriateness of the particular sentence imposed. We review a challenge to the sentencing process for an abuse of discretion. *Anglemyer v. State,* 868 N.E2d 482. The Supreme Court explained that a process-oriented abuse of discretion may occur in the following ways: (1) failure to enter a sentencing statement; (2) entering a sentencing statement that includes reasons not supported by the record; (3) entering a sentencing statement that omits reasons clearly supported by the record and advanced for consideration; or (4) entering a sentencing statement that includes reasons that are improper as a matter of law. *Anglemyer v. State,*868 N.E.2d 482.

On the other hand, a defendant who challenges the appropriateness of the sentence itself must do so via Appellate Rule 7(B), which provides that the court may review a sentence authorized by statute that it finds the sentence to be inappropriate in light of the nature of the offense and the character of the offender. The defendant bears the burden to persuade us that his sentence is inappropriate. *Anglemyer v. State,* 868 N.E.2d 482.

Here, Guess first contends that the trial court failed to consider the following mitigating factors: 1) Rachelle induced or facilitated the offense; 2) there are substantial grounds tending to justify the offense; and 3) this was the first time he struck Rachelle. Because these mitigating factors were not advanced for consideration at trial, however, they

are waived.[6] *See id. See also Pennington v. State*, 821 N.E.2d 899, 905 (Ind. Ct. App. 2005) (stating that a defendant who fails to raise proposed mitigators at trial cannot advance them for the first time on appeal).

Guess next argues the trial court improperly weighed the aggravators and mitigators. Our Supreme Court has determined that a claim of improper weighing is no longer available, viz.,

> Because the trial court no longer has any obligation to "weigh" aggravating and mitigating factors against each other when imposing a sentence, unlike the pre-*Blakely* statutory regime, a trial court can not now be said to have abused its discretion in failing to "properly weigh" such factors. *See, e.g., Jackson v. State*, 728 N.E.2d 147, 155 (Ind. 2000) (finding that the Court could not determine from the sentencing statement whether the trial court "properly weighed" the aggravating and mitigating factors).

Anglemyer v. State, 868 N.E.2d 482. This claim is no longer viable as an abuse of the trial court's discretion.

Lastly, Guess contends that his sentence is inappropriate. Our Supreme Court has determined that it is "on this basis alone that a criminal defendant may now challenge his or her sentence where the trial court has entered a sentencing statement that includes a reasonably detained recitation of its reasons for imposing a particular sentence that is supported by the record, and the reasons are not improper as a matter of law, but has imposed a sentence with which the defendant takes issue." *Anglemyer v. State*, 868 N.E.2d 482.

Pursuant to Ind. Appellate Rule 7(B), this court has the constitutional authority to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the

[6] At trial, Guess conceded that that the fact that this was the first time he struck Rachelle was not a mitigating factor. *Transcript* at 184.

offender. This court's review under Appellate Rule 7(B) is deferential to the trial court's decision. *Dixon v. State*, 825 N.E.2d 1269 (Ind. Ct. App. 2005), *trans. denied*.

Here, with regard to the nature of the offense, Guess punched his wife in the face at least ten times while she was sitting in bed with their one-year-old daughter, covering them in blood. Guess fractured Rachelle's eye socket, which required eye surgery. In addition, Rachelle continued to have problems with her eye at the time of trial. Specifically, nasal drainage was coming out of her eye, she had difficulty seeing to drive on both sunny and rainy days, and she had intermittent tearing which might require additional surgery.

With regard to the character of the offender, our review of the record reveals that, as the trial court pointed out, Guess has an extensive criminal history of violence spanning twenty years, including convictions for the following offenses: four convictions for disorderly conduct, three convictions for battery, and three convictions for resisting law enforcement.[7] The significance of criminal history as a sentencing consideration varies based upon the gravity, nature, and number of prior offenses as they relate to the current offense. *Wooley v. State,* 716 N.E.2d 919 (Ind. 1999). Here, Guess's criminal history includes an escalating history of violence. Guess has also had numerous probation revocations, showing, as the State points out, that less restrictive measures have been unsuccessful. Based upon the foregoing, Guess's sentence in this case is not inappropriate.

Judgment affirmed.

BAKER, C.J., and CRONE, J., concur.

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[7] Guess also has convictions for carrying a handgun without a license, driving with a suspended license, and operating a vehicle while intoxicated.